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## Substantive Standing, Civil Recourse, and Corrective Justice

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# FLORIDA STATE UNIVERSITY LAW REVIEW



SUBSTANTIVE STANDING, CIVIL RECOURSE,  
AND CORRECTIVE JUSTICE

*Benjamin J. Zipursky*

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# SUBSTANTIVE STANDING, CIVIL RECOURSE, AND CORRECTIVE JUSTICE

BENJAMIN C. ZIPURSKY\*

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## INTRODUCTION

A critical issue in trying to clarify and solidify civil recourse theory is grasping the nature of the right of action against a tortfeasor and its relation to the right that the tortfeasor allegedly violated. With this issue in mind—and considering the broader goal of revisiting civil recourse theory from the ground up—it may be illuminating to

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\* Associate Dean for Research & James H. Quinn Professor, Fordham University School of Law. Thanks to Curtis Bridgeman, John Gardner, John Goldberg, Arthur Ripstein, Andrew Robertson, Seana Shiffrin, and participants in The Florida State University Law Review Symposium on Civil Recourse Theory, the Melbourne Torts Workshop of February 2011, the University of Toronto Legal Theory Workshop, and the UCLA Law and Philosophy Colloquium, for helpful comments on a previous draft.

examine the set of problems that led me to put forward civil recourse theory as an alternative basis for a general theory of tort law. That is provided in Part I, below, in a form that is more autobiographical than is customary.

Part II surveys the range of issues in tort theory to which civil recourse theory has led, but does so with the aim of actually honing in on certain core issues. The process of focusing on a key normative issue is further winnowed down in Part III, which offers both methodological clarifications and quite a general normative account of the attributes of tort law, according to the tort theoretic work I have done (including, but not limited to, civil recourse theory) both individually and with John Goldberg. In doing so, Part III identifies as our question: What is the principled justification for the aspect of our legal system that recognizes individuals as having a right of action against those who wronged them? More specifically, I acknowledge that the Principle of Civil Recourse is said to provide a principled justification for the state's empowerment of individuals with private rights of action against those who have wronged them. The question is what, in such context, the Principle of Civil Recourse really means and in what sense it justifies private rights of action.

Part IV frames the challenge of the Article by reference to the following disjunctive critique (which is a variation of Arthur Ripstein's critique): Civil recourse theory is unacceptable if it is a variation on a revenge theory, and if it is not, it must derive from corrective justice theory. If that is so, then either the civil recourse critique of corrective justice theory is unsound (Ripstein's view), or it is sound, but dooms civil recourse theory itself. Part IV indicates my reasons for rejecting both revenge-based theories and corrective justice theories. Part V begins us down the path of reconstructing civil recourse theory and acknowledges the influence in the new account of work by other scholars: in law (Jason Solomon) and moral philosophy (Stephen Darwall and P.F. Strawson).

In many ways, the most significant section of the Article is Part VI, which concerns positive morality, and not tort law. Part VI examines accountability for wrongs and the entitlement of victims of wrongs to demand responsive conduct from those who have wronged them. The right to demand responsive conduct from a person by whom one has been mistreated is distinguished from the right against mistreatment. I also argue that the right to demand responsive conduct is not derivative of a duty to provide responsive conduct to those whom one has wronged.

Finally, Part VII returns to the law of torts, utilizing the account developed in Part VI to give force and substance to the normative basis of the Principle of Civil Recourse. In so doing, it explains why civil recourse theory is fundamentally distinct both from corrective justice

theories and from vengeance-based theories. The conclusion brings me back to the idea of substantive standing, with which I begin.

## I. CIVIL RECOURSE AND THE PROBLEM OF SUBSTANTIVE STANDING

Contemplating fraud (theoretically, not practically) was the beginning of my thinking about civil recourse and relational wrongs, for there is a philosophical problem buried in the law of fraud that I came across as a practicing lawyer in 1993. Fraud doctrine contains a rule stating that a plaintiff has no cause of action in fraud without proof that he or she relied upon the fraudulent representation of the defendant. The intuitively obvious explanation of the rule is that a person has not been defrauded by the defendant, even indirectly, unless he or she acted because of being deceived by the defendant's fraudulent representation or concealment. A claim for fraud is essentially predicated on the idea that one was defrauded by the defendant.

Tort scholars and corporate law scholars know that this rule has kinks in it, some old and some new, some in the common law and some in common law descendants such as federal securities fraud (which softens reliance by fraud-on-the-market doctrine<sup>1</sup>). Since 1993, I have written a lot about those kinks; most notably, my coauthors John Goldberg and Tony Sebok and I have together written a whole article on the place of reliance in fraud, and much of it focuses on the kinks in the rule.<sup>2</sup> However, since the beginning I have maintained the view that the rule basically still exists in quite a strong form, and that, except in consumer law (and perhaps even there), the exceptions do not swallow the rule. More to the point, whatever change has occurred goes no distance in persuading me that the rule was simply a mistake or tort doctrine's crude way of making another point. My sense then and my sense now is that the reliance rule carves at the joints of a cogent notion of a claim for fraud.

And yet the reliance rule is a problem for instrumentalist theories and for a range of noninstrumentalist theories, too. Deterrence, compensation, and fairness rationales give the reliance requirement no place at all or a highly contingent and frequently defeated place. *Rosen v. Spanierman*,<sup>3</sup> an unremarkable Second Circuit case from 1990, is a good example. The plaintiff provided money to a couple so that they could buy a special piece of art on the occasion of their wedding.<sup>4</sup> The couple bought a work of art from an art dealer who represented it as an authentic work by an accomplished artist, which

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1. See *Basic Inc. v. Levinson*, 485 U.S. 224, 250 (1988).

2. See generally John C.P. Goldberg et al., *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001 (2006).

3. 894 F.2d 28 (2d Cir. 1990).

4. *Id.* at 30.

it turned out not to be.<sup>5</sup> The plaintiff sued the dealer for fraud but lost because the plaintiff did not rely on any representations by the dealer.<sup>6</sup> From a deterrent, compensatory, and fairness point of view, the result seems wrong. But while the plaintiff may have been harmed, she was not defrauded.

I have always conceptualized the point as follows: Fraud is a wrong, and a wrong is a doing of a sort that has two ends to it—in classical terms, an *agent* end and a *patient* end. The patient end of the wrong of fraud involves being deceived by the misrepresentation of the defendant. If this piece of the picture is absent, then what is in front of the court in the plaintiff's lawsuit is not a well-formed version of the tort of fraud. There may be some other wrong with the defendant's conduct on the one end and the plaintiff's injury on the other. Or, it may be that we should rethink or expand what we want to understand fraud to be. Or, it may be that we want to stick some provisions into the law so that one gets to recover money even though one has not actually been defrauded. There is nothing odd about a court starting with the presumption that it is not going to do any of the variations above; that it simply wants to know whether it has a common law fraud claim in front of it. And, if that is in fact the question the court is exploring, then the answer is that plaintiff reliance is required.

I have always thought of this part of the analysis as the easier part, and I still do. By that, I do not mean to suggest that it is easy, just that it is less difficult than what comes next. What comes next is of course the question: Who cares? Why does it matter whether the plaintiff was defrauded? She is not asking for a declaratory judgment about the contours of the tort of fraud as a two-sided wrong. She is asking for money because she was injured, and she was injured because of the defendant's fraudulent conduct in a fairly direct way. Why is it relevant whether she was defrauded? Doesn't this in fact beg the question?

Here, I felt, and still feel today, that there we have the earmarks of a true philosophical question, one that lies at the philosophical foundations of private law and perhaps deeper than that. I do not mean by this that the question is clearly important. On the contrary, the problem seemed to me like other philosophical problems in the following respect: I could not actually tell whether it was important at all, because there seemed to me some chance that it was vacuous to say that one has a right of action in fraud only if one was defrauded. If it was not vacuous, then it would indeed be fundamental. But anyone who wanted to reject the view that it was vacuous would have to explain why not. Then he would have to say what it means. And

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5. *Id.*

6. *Id.* at 36.

then he would have to say what justification or rationale could be put forward in support of it. Doing all three of these—or, for that matter, any one—seemed to me a very challenging task.

All of this I decided before I even entered the legal academy. It was my good fortune that when I began teaching law at the University of Pittsburgh, I was asked to teach a course on defamation and privacy, for the law of defamation turned out to help me with this new research project. A plaintiff does not have a claim in libel unless the defendant made a statement about him or her—“of and concerning” the plaintiff, as the common law puts it.<sup>7</sup> So, imagine a woman in small town U.S.A. whose husband is the coach of the girls basketball team at the high school. The town newspaper publishes a story saying that the husband has been having sex with the girls on the team. If the wife—who accepts her husband’s avowals of innocence—sues the newspaper on the ground that its false and libelous statements have caused her to be emotionally tormented and shunned in her town, she will be subject to a motion to dismiss under the common law of libel, regardless of any evidence regarding the truth or falsity of the story.<sup>8</sup> That is because her claim is missing the “of and concerning” element.

This struck me as yet another case illustrating a basic feature of the law: A plaintiff does not have a libel claim unless she herself was defamed; that she was foreseeably injured by the defendant’s defamatory statement is not enough. Libel, like fraud, is a two-ended wrong, and a plaintiff has no claim unless she is at the patient end of the wrong, and that means the defendant’s defamatory attack must have been a defamatory attack upon her. Although hardly the best known feature of libel law, the “of and concerning” element is far from obscure; the failure of Commissioner Sullivan to satisfy that element was indeed a significant feature of Justice Brennan’s landmark opinion in *New York Times v. Sullivan*.<sup>9</sup>

During my year in Pittsburgh, I became aware of the growing literature on the philosophical foundations of tort law, especially the work of Jules Coleman, Ernest Weinrib, and Stephen Perry. I was heartened to learn that relationality was understood to be highly significant. And Ernest Weinrib’s words on *Palsgraf*<sup>10</sup> and correlativity were, of course, music to my ears.<sup>11</sup> For I saw that *Palsgraf* is in negligence law what the reliance and “of and concerning” cases are in fraud and defamation: The defendant must have breached a duty of

7. See, e.g., *Dean v. Dearing*, 561 S.E.2d 686, 688 (Va. 2002).

8. Cf. *Johnson v. Sw. Newspapers Corp.*, 855 S.W.2d 182 (Tex. Ct. App. 1993) (stating that a wife has no independent libel cause of action for injury allegedly resulting from statements about her husband’s football coach’s conduct in precipitating brawl).

9. 376 U.S. 254 (1964).

10. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

11. See Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

nonnegligence owed to the plaintiff; negligent conduct injuring the plaintiff is not enough. As I began to lay out what I regard as many of the most difficult doctrinal problems in negligence law, I saw that many of them involved essentially the same puzzle. An investor who loses money because an accountant breached a duty of care owed to his client could not (until the past few decades) recover from the accountant, because the accountant did not breach a duty of care owed to the defendant.<sup>12</sup> The requirement of a nexus between breach and duty within negligence law is the analogue of reliance in fraud and “of and concerning” in defamation.

The general rule of which each of these is an instance (I came to believe) is the rule that a plaintiff does not have a tort claim against a defendant whose tortious conduct injured her unless the defendant’s conduct was wrongful relative to the plaintiff in the manner specified under the law of the tort in question.

I coined a term to help articulate this idea: “substantive standing.” The idea is that every tort has a requirement that the defendant’s conduct be wrongful relative to the plaintiff in a particular way: reliance in fraud, “of and concerning” in defamation, breach-duty nexus in negligence, possessory interest in property torts, and so on. Because this is a requirement concerning the plaintiff’s injury that can defeat a claim even if the plaintiff succeeds in proving that the defendant committed the tortious action, I called it a standing requirement. Because it demands certain substantive content in the nature of a plaintiff’s injury, I called it the “substantive” standing requirement. Substantive standing refers to the aspect of a plaintiff’s injury being of a certain sort relative to the wrong. A substantive standing requirement is simply a rule that a plaintiff does not have a tort claim of a certain sort unless she has substantive standing (for that tort). My first torts article began by making a detailed doctrinal argument that every tort has a substantive standing requirement within it.<sup>13</sup> Incidentally, I was in part drawn to the idea of substantive standing because my work as a lawyer in antitrust law had educated me about the existence of a nonprocedural “standing” element in private antitrust actions.

Three difficult questions presented themselves, as suggested earlier: First, is it vacuous to say that the plaintiff has no fraud claim unless the defendant defrauded her; the plaintiff has no negligence claim unless the defendant breached a duty of care owed to her . . . and so on? More generally, is it vacuous to say that a plaintiff has no claim for a wrong unless the defendant’s wronging was a wrong to

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12. *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931).

13. Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).



her in the relevant sense? Second, what does such a statement mean? Third, if it is not vacuous, what is the rationale for it? These were the three questions on fraud, now broadened to all of torts. The working paper, at the time, was called “Substantive Standing in the Law of Torts.” It will be convenient to rephrase the questions as I did then: Are substantive standing requirements vacuous? If not, what do they mean? And what is the justification for requiring substantive standing?

I ended up giving answers to all three questions, both in their particular forms and in their more general forms. These are the answers I would offer today, too. They go roughly as follows:

1. Substantive standing rules are not vacuous because there are ways of specifying the content of the conduct by the defendant, the injury of the plaintiff, and the manner in which the conduct and injury are connected, which can be articulated independently of raising the question of whether the plaintiff is entitled to recover from the defendant.
2. Substantive standing rules presuppose a certain kind of norm of conduct—a relational directive—that constitutes the fount of the normativity of each tort. The structure of such directives is that they contemplate a domain of agents and a domain of patients and they envision a kind of wrongdoing by the agent of the patient—X defrauds Y. These wrongs are mistreatments of one person by another; they are relational wrongs that are envisioned. Substantive standing rules presuppose that tort law contains relational normative directives enjoining the potential agents from mistreating the potential patients in this way. They are, to use a term of Dale Nance’s (drawing upon Hart, paralleling Coleman and Kraus, and contesting Calabresi and Melamed), more like “guidance rules” than “enforcement rules.”<sup>14</sup> As I suggested in that paper and argued in several subsequent pieces, the presence of a kind of injunctive force in these directives does not require adoption of a noncognitive metaethics, or the rejection of an objectivist jurisprudence. Although the existence of the legal directives is a different issue from their merit, the enterprise of identifying rights, duties, and directives in the law of torts is a hermeneutical one undertaken within the (not exactly or exclusively defined) domain of legal discourse, not the sort

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14. Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 VA. L. REV. 837, 861 (1997). Nance expressly draws from H.L.A. HART, *THE CONCEPT OF LAW* 88 (1961), Nance, *supra*, at 859-60, and notes the complementary nature of Jules Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986), Nance, *supra*, at 840. As Nance’s title indicates, his article is put forward as a critique of Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Nance, *supra*, at 840.

of head-counting enterprise that, for example, Dworkin often attributes to Hart.<sup>15</sup> A right of action in tort is a power to obtain redress from another person through the courts. Substantive standing rules say that a right of action for P in a certain tort T against D is dependent upon D's having done the tort T upon P in the manner enjoined by the relational directive corresponding to the tort T; that P has a right of action for T against D only if P was among those upon whom D was enjoined not to commit T, and D did commit T upon P.

3. Rights of action under tort law supply an avenue of civil recourse for the plaintiff against one who wronged the plaintiff. The power to redress the legal wrong done to oneself is supplied by the state pursuant to a duty of the state to provide some avenue of recourse to those who have been wronged. It is civil recourse in three senses: it is civil as opposed to being barbaric, civil opposed to being criminal, and civil as opposed to being independent of the structure of law.

What seemed capable of solving the problem was a principle of civil recourse: A person who has been legally wronged is entitled to an avenue of civil recourse against the wrongdoer. Blackstone's and Locke's major statements on private law each contain what are fairly regarded as antecedents of the same idea, embraced from a normative point of view, more than a doctrinal one.<sup>16</sup> The interpretive claim was that the common law of torts contains a principle of civil recourse and that causes of action in tort are provided by the state as a way of complying with the principle of civil recourse. Against a backdrop according to which a person is presumptively *not entitled* to the state's assistance in acting civilly against a private party for a money judgment or for an order that another private person act in some way, there was a sort of negative rule of recourse: A person is not entitled to a right of action in tort against another unless that other committed a legal wrong against her.

All of this was published in my article *Rights, Wrongs, and Recourse in the Law of Torts* in *Vanderbilt Law Review*.<sup>17</sup> I felt I had the interpretive explanation for my fraud puzzle, as well as those in libel, and substantive standing in each tort, including negligence. I felt I had generated an adequate explanation of *Palsgraf*. And I had argued, and still believe, that the existence of substantive standing

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15. Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855, 869-74 (1972) (describing and criticizing Hart's concept of social rules, which relies upon social facts about the actions that are in fact taken by numerous members of the community).

16. Cf. Benjamin C. Zipursky, *The Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 637-42 (J. Coleman & S. Shapiro eds. 2002) (setting forth Blackstonian and Lockean roots of civil recourse theory).

17. See Zipursky, *supra* note 13.

rules constituted substantial evidence against the interpretive adequacy of other leading frameworks, including the most common variants of law and economics and corrective justice theory.

## II. CIVIL RECOURSE, RELATIONAL WRONGS, AND TORT THEORY MORE BROADLY

The development of a conception of torts in terms of relational wrongs and civil recourse theory were thus in significant part a response to the problem of explaining what I had dubbed the “substantive standing” requirement. John Goldberg and I have developed the framework of relational wrongs and civil recourse theory and several related projects collaboratively since then. Let me turn now to the subsequent projects.

First, there is a family of interpretive and doctrinal projects about the wrongs of tort doctrine.<sup>18</sup> If tort law is all about relational wrongs, what are the wrongs, and what explains the contours of those wrongs? For example, why aren’t there duties to safeguard another person’s emotional well-being, absent a special relationship, within negligence law?<sup>19</sup> Why is the wrong of fraud constructed so that it is all about deception, rather than all about not hurting someone through deception? Why is proof of actual harm essential to the wrong in some cases—negligence—but not others—libel? What is the nature of the fault, if any, at the core of various wrongs? And so on. Explaining why the duty element of negligence has the contours it does; why the relational wrong of negligence, and the relational directive underlying it, has the content it does—is the project John Goldberg and I first undertook in *The Moral of MacPherson*,<sup>20</sup> which John and I started writing together before I had finished writing (and long before I had published) *Rights, Wrongs and Recourse in the Law of Torts*. Broadly speaking, it is the project of understanding from an interpretive point of view what the normative principles are underlying the primary rights and duties of the several torts. We have argued that an across-the-board instrumentalist approach to explaining where tort law draws its lines will not work.

A second set of projects is again doctrinal and goes to the subject of remedies. If the principle of civil recourse is what drives the idea of a right of action, does it explain why the right of action is for compen-

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18. See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* (Dennis Patterson ed., 2010); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) [hereinafter Goldberg & Zipursky, *Torts as Wrongs*].

19. See generally John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625 (2002).

20. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998).

satory damages in most cases, but not in all cases? If not, what does explain that? The question of whether there is a right of action and a right to redress does not answer what the remedies shall be, or why. John Goldberg and I have both done substantial work on this question, both individually<sup>21</sup> and jointly.<sup>22</sup> Corrective justice theorists are right to pay attention to the idea of making whole, but this is less clear, less literal, less exclusive, and less foundational than they have realized. Rather, it is principally relevant to what remedies are available and why, not to the question of why there should be private rights of action and tort liability at all.

Third, there were questions of intellectual history and legal history: Where does the idea of civil recourse come from? How deep is its role in Anglo-American tort law? Where does it fit into the political theoretical framework of thought underlying Anglo-American tort law? What are its roots in American tort law? John and I, in *The Moral of MacPherson*, deepened the project of explaining Cardozo as holding a view of relational duty that fit into the framework that I had articulated for *Palsgraf* and more generally into civil recourse theory.<sup>23</sup> The best article on the place of civil recourse in English and American legal history asserts that it was central both in the history of the common law and in the thinking of the framers of the American Constitution.<sup>24</sup>

Fourth, there are also two projects that are in some sense methodological: one pertaining to the nature of common law explanation and to the nature of the common law itself, and one pertaining to the normative theory of adjudication in the common law. We have not always been as careful as we might in distinguishing these. The first I have labeled “pragmatic conceptualism”;<sup>25</sup> it is the position that legal explanations of parts of the common law lay bare the inferential structure of the concepts that inhere in various parts of the common law, and that what it is for various concepts to inhere in the common law is for there to be a set of practices of deciding cases various ways based upon the content of the cases. The concepts are in a sense nodes in the practices; the explanation of the concepts is, in a sense, simply an elucidation of the practices. The second, normative theory of adjudication we initially called “conceptualistic pragmatism.”<sup>26</sup> It rests upon the assertion that judges ought to engage in the Cardozo-

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21. See, e.g., John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005).

22. See GOLDBERG & ZIPURSKY, *supra* note 18.

23. See *id.*

24. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

25. Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).

26. See Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649, 690 (1998); Goldberg & Zipursky *supra* note 19, at 1717.

like practice of shaping the common law as one understands its role in real life, but doing so in a manner that preserves the structure of the concepts that give the law content and form.

My principal goals in the main parts of this Article are distinct from all of the above. I aim to deepen the analysis of the idea of civil recourse and also to deepen the account of the set of principles and values underlying the basic structure of tort doctrine. I mean to show how a set of normative ideas is plausibly viewed as the set to which our system is committed insofar as it provides and applies a common law of torts, and I mean to place that set of ideas in its best light. It is quite important to frame our central question considerably more narrowly, however. Doing so will require two further stage-setting exercises.

### III. METHODOLOGICAL CLARIFICATIONS

#### A. *Rights of Action and Civil Recourse*

Part of what I (and John Goldberg) have sought to explain is what I shall now call “The Right of Action Principle”: *An individual who was legally wronged is prima facie entitled to a right of action against the wrongdoer.* The first, and most doctrinally basic, assertion of civil recourse theory we have put forward is that *the common law of torts is comprised in part by the Right of Action Principle.*<sup>27</sup> This might be called the “Right of Action Metastatement.” The Right of Action Principle does not itself utilize either the phrase “civil recourse” or the concept of civil recourse, nor does the Right of Action Metastatement. Note that this paragraph has somewhat confusingly worked at two different levels: a level that is about rights of action and wrongs (The Right of Action Principle), and a level that is about the common law of torts (The Right of Action Metastatement).

In my original article, I articulated the Principle of Civil Recourse: *One who has been wronged by another is entitled to an avenue of recourse against the wrongdoer.*<sup>28</sup> Relatedly, an important assertion about tort law within civil recourse theory is that *the common law of torts is comprised in part by the Principle of Civil Recourse.* This might be called the “Civil Recourse Metastatement.” The evidentiary basis for the Civil Recourse Metastatement is the Right of Action Metastatement, because the Right of Action Metastatement is more doctrinally basic than the Civil Recourse Metastatement—i.e., one can arrive at the Right of Action Metastatement by gathering appellate decisions, analyzing them, and then bringing them together, but one cannot (justifiably) arrive at the Civil Recourse Metastatement without proceeding through the Right of Action Metastatement. On the other hand, the

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27. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 738 (2003).

28. See Zipursky, *supra* note 13, at 82-90.

Principle of Civil Recourse itself is more basic, normatively, than the Right of Action Principle; within tort law itself it is part of what justifies the Right of Action Principle, but not vice versa.

Although the principal explanatory goal of this Article is to deepen the account of the Principle of Civil Recourse and the Right of Action Principle, it is important to frame this inquiry within a broader setting. To that end, I shall briefly outline a number of kinds of justification that might be offered for a legal system, like our own, that permits victims of wrongs to bring rights of action for torts. It is a sketch of several normative defenses of tort law as we have analyzed it (i.e., a system that is comprised in part by the Right of Action Principle, in part by a set of relational legal directives, and in part by a variety of remedies doctrines). The account sets out three different (and mutually consistent) kinds of justification: rights-based justification, constructive justification (which are quasi-instrumental), and instrumental justification. The point of the outline is to specify more cleanly the normative question to be addressed, but to do so in a manner that does not (misleadingly) suggest that the entire value of tort law for our society or legal system depends on its providing an avenue of civil recourse.

### *B. Valuable Attributes of a System that Provides Private Rights of Action*

#### *1. Identifying the Principle of Civil Recourse*

The Right of Action Principle, as mentioned, is justified by the principle that the victim of a legal wrong is entitled to an avenue of civil recourse against the wrongdoer: the Principle of Civil Recourse. The Principle of Civil Recourse means that if a plaintiff has been wronged the plaintiff is entitled to obtain a judgment against the defendant in tort, for the availability of a judgment is a form of recourse. The reason for having a right of action is that the affront of the tort is properly viewed as a ground for a kind of claim against the wrongdoer; so that a victim is not rendered powerless because she has a right to proceed against the wrongdoer, through the state. This paragraph is deliberately incomplete; much of Parts IV-VI is an effort to flesh it out.

From a justificatory perspective, several additional points are important. For heuristic purposes, I shall divide these points into two trios, calling the first trio “constructivist justifications” and the second trio “instrumental justifications.” They are, to be more precise, justifications of the provision of rights of action in tort to victims.

#### *2. Constructivist Justifications*

First, the capacity to understand ourselves as guided by relational legal directives of conduct, relational duties, and relational rights,

depends in part on a system of accountability that helps us to recognize them and take them seriously. Second, the concrete protection of individual goods that the law provides is provided in substantial part because there is accountability. Third, the capacity to build law upon community morality itself is valuable and turns in part on the capacity of courts to convert socially accepted norms of morality into norms of law, and the capacity of actors to sustain norms of responsibility and community morality is itself aided by the existence of a publicly enforceable set that the parties justifiably regard as quite thin.

Whether it be private property or good reputation or security in one's bodily integrity, the individual good would not exist as the sort of good it does were there not private rights of action available against those who interfered with this good in certain respects. Because the protection of tort law is among the important legal mechanisms for protecting such goods, one is tempted to refer to such protection as an instrumental value of tort law. However, this would be misleading, for one cannot fully identify the nature or value of such goods—rights to private property—without seeing that it comes with a bundle of legal protections. The phrase “constructive justification” is meant to capture the intermediate status of this kind of justification. A similar, constructivist point applies to the role of a system of private rights of action in sustaining the legal directives of tort law. It would be odd to say that private rights of action are a mere instrument for the enforcement of the relational directives of tort law, for part of how they maintain their role as accepted norms of conduct lies in their being connected to institutional mechanisms of enforcement, and part of what makes them “legal” directives is that they are connected with private rights of action.

### 3. *Instrumental Justifications*

The practices associated with legally enforceable demands of wrongdoers for a response—tort law—foster more harmonious intercourse in society, just as the practices associated with moral demands for responsive conduct do. There is an institutional game plan for dealing with the injury, expense, indignation, anger, and resentment that flow from the legal wrongs that have been visited upon individuals. The state makes its courts available so that victims may use them to demand responses from wrongdoers. We are not left to the uncertainty of moral demands or the chaos and bedlam of private retaliation. Legal demands and legal accountability not only circumvent private violence, they also permit healing and reconciliation in many cases. It is in part because we have the option of a right of action against wrongdoers that individuals and entities have the capacity to move on. These beneficial functions of having private rights of action in tort are specified in a manner that does permit one to refer

this discussion as offering an instrumental justification. To put the point differently, the justifications offered above are such that it is in principle cogent to suppose that a different plan for responding to wrongs was capable of dealing with the injury, expense, indignation, anger, and resentment generated by such wrongs and at fostering harmony more effectively, or with less expense or fewer negative repercussions, and if there were such a different plan, that would be a complete ground for deeming the other system superior, so far as those justifications go.

Second, by empowering plaintiffs with the right to sue, we are generating a system whereby the harshness of accidental injuries falling randomly upon the innocent often mitigates the situation. In the nineteenth century, tort law became a *de facto* compensation system for those accidentally injured, and it remains a highly significant part of the collection of legal mechanisms available to secure compensation for an accidental injury.<sup>29</sup> The compensation-function so described is also an instrumental justification. Indeed, for most of the twentieth century, the instrumentalist compensatory justification was literally of “hornbook” status.<sup>30</sup>

Finally, of course, by allowing wrongdoers to be held accountable, we ensure that the recalcitrant will have greater incentives to comply with their duties to others. There are many actors who are not particularly inclined to comply with norms of conduct simply because that is expected of them. For these actors, as for the bad man, it is socially valuable to be able to provide a set of incentives for deterrence purposes. Posnerian law and economics asserts that tort law is best interpreted as a set of institutions that impose liability in order to deter actors from socially harmful conduct without generating excessive costs in the form of diminished activity levels or extravagant enforcement or information gathering expenditures.<sup>31</sup> John Goldberg and I reject this claim, but that does not prevent us from recognizing the following: the availability of private rights of action for victims of torts serves the salutary function of deterring actors from engaging in tortious conduct.

#### 4. *Specification of the Question*

All of the above are valuable attributes of a legal system that allows certain persons who have been mistreated in various ways to bring rights of action against those who have so treated them. To the extent that a citizen or a legislature is considering altering the law,

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29. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 21-23 (5th ed. 1984).

30. *Id.*

31. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29 (1972).



any good reasons for altering the law or eliminating it must be understood against the backdrop of this larger justificatory account. Moreover, insofar as courts properly take their role to be legislative, awareness of these features is valuable. Finally, all of these justifications would be worth articulating insofar as a scholar or lawyer is considering questions such as: Why is it good to have tort law? Would there be a problem in eliminating or drastically diminishing tort law? What would be lost?

But Goldberg and I have followed corrective justice theorists, such as Weinrib and Coleman, in pursuing a conception of what tort law is quite different from that of realists and so-called legal pragmatists.<sup>32</sup> Like these thinkers in one way, and like Ronald Dworkin in others, we have taken the view that there is a deontic structure to the principles of the common law of torts itself.<sup>33</sup> Relatedly, a judge purporting to be articulating and applying the common law of torts must, in the first instance, decide in accordance with these principles. And so, at least for adjudication (as opposed to legislative revision), the most important question is not what makes tort law a valuable kind of law to have. The most important questions are what the legal principles are, whether they hang together as a normative matter, and what gives them whatever normative power and plausibility they might have.

#### IV. THE CRITIQUE OF CIVIL RECOURSE THEORY

##### A. *The Disjunctive Critique of Civil Recourse Theory*

The effort to put forward a normative account is, in part, framed by the desire to respond to critics. One group of critics has argued that our putative normative foundation is in fact simply corrective justice theory, supplemented by the assertion that it is victims, rather than the state, that hold the power to crank up the machinery that delivers corrective justice, and that (conversely) victims may choose not to enforce their rights.<sup>34</sup> A second group of critics has argued that Goldberg and I are really timid vengeance theorists.<sup>35</sup> For each of these critics, there are those who say that when civil recourse theory shows its true colors, it really is justifiable, and so we ought to show our true colors, for corrective justice theory really is justifiable or vengeance theory really is justifiable.<sup>36</sup> Conversely, there are those

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32. Goldberg & Zipursky, *supra* note 20.

33. *Id.*

34. See, e.g., Ernest J. Weinrib, *Civil Recourse and Corrective Justice*, 39 FLA. ST. U. L. REV. 273 (2011).

35. See John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 55-58 (J. Coleman & S. Shapiro eds., 2002).

36. See, e.g., Weinrib, *supra* note 34 (finding corrective justice theory justifiable); Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107 (2011) (finding vengeance theory justifiable).

who say that once its true nature is recognized, its flaws are undeniable.<sup>37</sup> One of the most powerful criticisms is a disjunctive one from Ripstein: it is that either civil recourse theory is vengeance-based, which is normatively unacceptable, or it is corrective justice based, which is acceptable but is not distinctive after all.<sup>38</sup>

Perhaps the most troubling objection of all is one that comes from myself; it is most easily depicted as a variation of Ripstein's disjunctive objection.<sup>39</sup> Either civil recourse theory's normative foundation requires the embrace of a right to avenge wrongs, in which case it is underdeveloped and functionalist in a highly questionable manner, or civil recourse theory is rooted in a principle of corrective justice, in which case it is unacceptable under its own critique; there is no way to flesh out civil recourse theory without defeating ourselves.

### B. Vengeance Theories

The question is *why* an individual is entitled to an avenue of civil recourse against someone who wronged him or her. One answer is that the victim of a wrong has a natural or prepolitical right to act aggressively against a wrongdoer and, because the state forecloses the exercise of this natural right, it incurs the obligation to provide a functional substitute. This is criticized by Finnis and others as the view that there is a right to revenge.<sup>40</sup> It is true that, in my initial article introducing civil recourse theory, I articulated a social contract argument from Locke that asserted a natural right to punish wrongdoers and a private right to compensation as a post-social contract substitute for the natural right.<sup>41</sup> Even then, however, I was clear that the social contract and natural right language were merely the scaffolding for a deeper set of principles, and John Goldberg and I have consistently eschewed reliance on a natural right of revenge or retaliation.<sup>42</sup>

A critical question is: *If the state duty to supply an avenue of civil recourse is connected with the prohibition of noncivil aggression*, how does that connection work? If noncivil aggression is put forward as a natural right in the sense of being a (moral) privilege that others must respect, one must offer an account of why a person is morally entitled to engage in noncivil aggression—violence—against one who wronged her or him. I did not and would not make that claim. I did,

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37. See, e.g., Sam Issacharoff & John Fabian Witt, *Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004); Finnis, *supra* note 35 (arguing that vengeance theory is untenable and therefore civil recourse theory is untenable).

38. See Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 186-88, 206-07 (2011).

39. *Id.*

40. See, e.g., Finnis, *supra* note 35, at 57.

41. See Zipursky, *supra* note 13, at 85-86.

42. See, e.g., GOLDBERG & ZIPURSKY, *supra* note 18, at 62-69.

however, suggest that a victim of a wrong has a strong desire to respond aggressively to having been wronged and that acting upon this desire would be of great subjective value to him or her.<sup>43</sup> In constructing a right to civil recourse out of this desire—let us call it a “desire to retaliate”—one might argue that the state may not cut off the option of acting upon this desire without supplying a good substitute; that it would not be treating citizens fairly if it did so. In addition to these contractualist arguments, there is, of course, a utilitarian and functionalist argument proceeding from the premise of a special interest in retaliation which is being stymied; the claim is that: (1) some of the utility of serving that interest can be retained, without the utility loss from private violence; (2) there will be too much social unrest if there is no avenue of noncivil or civil recourse—that is, civil recourse generates a great peace-and-stability dividend, which is socially valuable.

It seems to me now that there are at least three general problems with all of these accounts. The first is that many unanswered empirical questions jump out: How pervasive is this desire? How valuable is it actually to act upon it? How successful is an avenue of civil recourse as a substitute for a privilege of violent retaliation? A second is that there is a characteristic function or operation of a right of civil recourse, and it is in huge part to require the defendant to compensate the plaintiff and to repair the injury he or she inflicted. Retaliation is typically not constructive but destructive, and appears to have little to do with repair. A third is that—even apart from legal systems—a huge part of morality is learning to deal with having been wronged without acting upon vengeful desires. It is implausible to think of tort law as existing for those who lack the moral development to do that without civil litigation. Thus, notwithstanding the elegant and thoughtful accounts of scholars like Oman,<sup>44</sup> Hershovitz<sup>45</sup>, and Gold<sup>46</sup> holding up (or at least sustaining serious scrutiny upon) the “retributive” or “revenge” or “getting even” side of civil recourse theory, and speaking here only for myself (not necessarily for Goldberg), the corrective justice theorists are right to suggest that I do not really wish to go down a “right to retaliate” route.

### C. *Corrective Justice Theories*

The corrective justice critique asserts that the right to recourse turns on a correlative duty of the wrongdoer to provide compensation.

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43. Zipursky, *supra* note 13.

44. See generally Nathan B. Oman, *Why There is No Duty to Pay Damages: Powers, Duties, and Private Law*, 39 FLA. ST. U. L. REV. 137 (2011).

45. See generally Hershovitz, *supra* note 36.

46. See generally Andrew S. Gold, *The Taxonomy of Civil Recourse*, 39 FLA. ST. U. L. REV. 65 (2011).

The wrongdoer owes a duty of repair to the victim and that is why the victim has a right to be paid compensation by the wrongdoer. It is, in turn, because she has a right to be compensated by the wrongdoer for her injury that she has a right of recourse against the wrongdoer. More generally, the argument goes, victims have a right of recourse against wrongdoers because wrongdoers owe duties of repair to those whom they have wrongfully injured. As Ernest Weinrib has put it, civil recourse theory is not an alternative to corrective justice theory, it is a version of it.<sup>47</sup>

As a critic of the view that tort law enforces duties of repair and more generally of corrective justice theory, I am not prepared to accept this critique. I have elsewhere set forth my reasons for rejecting corrective justice theory as an interpretive account of tort law, but it is worth reiterating the difficulties surrounding corrective justice theory and the substantive standing problem. Duties of repair, on my view (although not on the view of Ripstein or Weinrib), track foreseeable wrongful losses. While there is a great deal of overlap between the domain of people who have been wronged under the relevant tort and the domain of people who have foreseeable wrongful losses, the latter is both underinclusive and overinclusive relative to the former, and systematically so. There are plaintiffs who have no losses at all but have rights of action, and there are plaintiffs who have unforeseeable losses and have rights of action because they have substantive standing. Conversely, there are many plaintiffs with foreseeable wrongful losses who have no right of action because substantive standing is lacking. So, among the many reasons I cannot accept the gracious peace offering of the corrective justice theorists is that I regard it as leaving me without a solution to the substantive standing problem with which I began.

Ripstein and Weinrib both accept that there is a substantive standing rule in tort law, that is, that a plaintiff only has a right of action in tort against a defendant if the wrong done by the defendant was a wrong to the plaintiff.<sup>48</sup> Indeed, as indicated above, my own work on substantive standing was heavily influenced by Weinrib's work on *Palsgraf* and more generally on correlativity in *The Idea of Private Law* and in several important articles leading up to it.<sup>49</sup> I do not (and could not) ascribe the proposition that the duty of repair tracks foreseeable wrongful loss to Weinrib or Ripstein; I attribute

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47. Weinrib, *supra* note 34.

48. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 114-44 (1995); see generally ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999).

49. See WEINRIB, *supra* note 48, at 114-44; Weinrib, *supra* note 34; Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403, 409-10 (1992).

roughly this proposition principally to Perry<sup>50</sup> and Coleman.<sup>51</sup> However, both Weinrib and Ripstein provide distinctive accounts of the duty of repair and its connection to the breach of the primary duty, accounts that are meant to accommodate the phenomenon of correlativity and, in my terms, substantive standing.<sup>52</sup>

The problem is that I do not believe the accounts they put forward hold up under scrutiny. While loss-based corrective justice theorists like Coleman and Perry offer an account that does link a duty of repair to a primary duty, the account diverges from the pattern of rules and principles in tort law itself. Wrongs-based corrective justice theorists, like Weinrib and Ripstein, retain the rules and principle of the tort law, but at the cost of their ability to explain why tort liability works as it does; in particular, they do not explain why the breach of a primary duty generates a duty of repair, as a general matter.

Weinrib believes that the breach of the primary cannot eliminate the duty; the duty must still be there even after the breach, and it is there in the different form of a duty of repair.<sup>53</sup> I reject the proposition that a breach of the duty of care could not eliminate the duty; it is entirely possible that an action that breaches a duty of care could alter the world by so doing, and in that altered world the proposition that there *is* a duty not to do X is no longer true (it is either false or incoherent). Suppose, for example, X has a duty to Y not to break the single lilac-tinted chicken's egg that Y entrusts him with at T1. If X breaches that duty at T2 (later than T1), there might well be something X could do at T3 to compensate Y for having breached this duty to Y, but it is not the case that, at T3, the proposition "X has a duty not to break the single lilac egg that Y entrusted him with" is true. It is perfectly coherent and possibly illuminating to say that the reason X must pay Y a certain amount at T3 is that X had a duty to Y not to break the egg at T2, which he breached at T2. Obviously, one wants more of an account of why the breach (at T2) of a duty to do A1 (keep the egg intact, refrain from breaking the egg) yields a duty at T3 to do A2 (pay Y).

John Gardner has intriguingly suggested that there is a "continuity" between A1 and A2, and elaborated upon this point by asserting that the reasons for the duty to do A1 at T2 still exist at T3, and those same reasons generate a reason to do A2 at T3.<sup>54</sup> Although I am skeptical about whether this argument will actually succeed in ex-

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50. See Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

51. See generally JULES L. COLEMAN, *RISKS AND WRONGS* (1992).

52. Weinrib, *supra* note 34, at 276-78; Ripstein, *supra* note 38, at 197-98.

53. See Weinrib, *supra* note 34, at 280-82.

54. See generally John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice*, in Paper No. 1/2010 U. OF OXFORD LEG. RES. PAPER SERIES (January 2010), <http://ssrn.com/abstract=1538342>).

plaining why there are private rights of action against tortfeasors for compensation, it does escape the vulnerabilities of Weinrib's contention that X's duty to Y survives the X's breach of that duty, as a general matter.

Ripstein's account, as I understand it, lies somewhere between Gardner's and Weinrib's (as I outlined it).<sup>55</sup> It appears that he does not need to take a position on whether the primary duty survives the breach or whether the continuity thesis is more apt, because he formulates his account in a manner that is, in the first instance, rights-based rather than duty-based. Where the right in question is a simple example of a property right—for example, chattels, like a winter coat—both Weinrib's and Gardner's accounts work very nicely. If X breaches the duty correlative to Y's right to the exclusive possession of the coat—e.g., X takes the coat—Y's right to the exclusive possession of the coat survives that breach, and X's duty correlative to that right also survives that breach. Likewise, there is an obvious continuity between X's duty not to take the coat and X's duty to return the coat (or, if X destroyed the coat, to pay Y compensation in the order of the value of the coat). In order to come down on Weinrib's side or Gardner's side, Ripstein would have to choose a particular account of how one wants to individuate duties correlative to rights underlying tort law; for the most part, he has declined to make this choice. Interestingly (and not coincidentally), Gardner (a Razian interest-theorist about rights) stands in a good position to embrace this combined account, by saying that a right exists insofar as there is an interest that provides a reason for the imposition of the primary obligation, and where it is that same interest that provides a reason for the imposition of the remedial obligation, there is in fact a right to reparation; in this sense, there is a continuity of right.<sup>56</sup> And I should add, in fairness to Weinrib, he certainly never takes duties to be more basic than rights and likely understands his own account as on all fours with Ripstein's. Indeed, he has maintained in his article in this volume that the critique I have run, above, depends on an individuation of X's duties of a sort that he himself has never offered, and actually rejects.<sup>57</sup>

My central difficulty with Ripstein's account does not pertain to whether it might in principle be adequate for a domain of private rights and duties, existing in and enforceable through private law. It might. The question is whether the body of law we know as the com-

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55. See generally Ripstein, *supra* note 38. The larger work into which Ripstein's version of corrective justice theory fits is ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009); see also Arthur Ripstein, *As if it Had Never Happened*, 48 WM. & MARY L. REV. 1957 (2007) [hereinafter Ripstein, *Never Happened*].

56. See Gardner, *supra* note 54, at 54-55.

57. See Weinrib, *supra* note 34, at 280-81.

mon law of torts can be so understood. I claim it cannot. However nicely some domains of property torts might be accommodated by this account (and I certainly have my questions, even here), a very wide swath of negligence law and intentional tort law cannot be so understood. Ripstein's whole account is in a certain sense dependent on rights that are in two important respects property-like: (a) the rights invasion can be fairly characterized as an interference with the plaintiff's means (insofar as the rights invasion is in some way harm-dependent, the harm is a deprivation of the means to carry out purposes an actor has chosen or is entitled to choose; insofar as the rights invasion is not at all harm-dependent, it is intentional, and therefore involves the nonconsensual usage of the plaintiff's means for the purposes of the defendant); (b) the remedy of compensatory damages through monetary payment can be fairly characterized as putting things back into a form that is "as if it had never happened."<sup>58</sup>

Chattels—like a piece of clothing or an automobile—arguably satisfy these two conditions; whether real property or personal property with a sort of history or a set of irreproducible features qualify is a closer question, to put it gently. What I firmly reject is the contention that the many wrongs of tort law—most of which are not property torts—can be understood as the breaches of duties correlative of rights so conceived. Negligence or malpractice or battery culminating in irreparable physical injury—such as disfigurement or chronic pain—do not, in my view, meet either condition (a) or (b) above. Nor do a variety of other torts, both intentional and unintentional, that involve nonphysical and nonproprietary injuries. Libel, invasion of privacy, and assault are easy examples. Even if we conceded that all such nonphysical injury and nonproperty torts are intentional (which they are not), that is a far cry from saying that they involve use of a plaintiff's means for a defendant's purposes. The wronging in each of these cases is a doing, a negative mistreatment that is neither a deprivation of stuff nor a purposive use of others' stuff.

This is a big point, not a small one. It goes to the heart of the question of whether tort law in operation should really be understood as rectifying wrongs that are done in a sense that is nearly restitutionary. To their credit, Weinrib and Ripstein (who maintain that it should) offer an account according to which raw interests are normatively reprocessed through an equal and reciprocal normative framework, so that they become rights; that is to say, while interests are in some sense at the core of rights, it is only cogent to talk about them within a more thoroughly normativized framework, one which views interests through the structure of rights (not vice versa).<sup>59</sup> The prob-

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58. See generally Ripstein, *Never Happened*, *supra* note 55.

59. Ripstein, *supra* note 38, at 171 ("[R]elational rights are not granted to protect interests taken to matter apart from them; interests are protected on the basis of rights.").

lem is that tort law is about rights invasions and wrongs that do not abide by this theoretical framework. Tort law in operation does not in fact make the paraplegic or the libeled schoolteacher or the traumatized person “as if it had never happened”; it does not do so in its normal operation and it does not indulge itself in the illusion that it is actually capable of doing so. The wrongs of tort—especially the ones that generate individual law suits—cut to the bone, and are not just about means.

While Weinrib might be correct that the wrongful act that constitutes the tort is narrower than the duty correlative to the right, the duty cannot be stated so broadly that one has discharged it by paying compensatory damages. While the fact that the wrong has been done and the injury has been inflicted does not undercut the importance of a compensatory damages award, it is distorting the reality to suppose that a compensatory damages award is a discharge of the later version of the duty that was breached. While it may be true to say that “one’s health is the most important thing one has,” it does not follow that one *has* one’s health in the sense that one has a car. Compensating someone for having wrongfully injured him is not the same as returning to him the uninjured condition or its equivalent, because the state of being uninjured is not a piece of property or anything like it.<sup>60</sup>

#### D. Summary

The larger question of this Article is not, however, about whether corrective justice theory is sound or about whether a right to retaliate view is tenable. It is about whether, assuming that one intends to reject both of those frameworks, there remains a normative basis for civil recourse theory. Put differently, the challenge of this Article is to set forth a justification for civil recourse theory that is not based in a right of revenge but is not simply a version of corrective theory either. Unsurprisingly, the way between the rock and the hard place travels close to each, sometimes perilously so.

### V. SOLOMON, DARWALL, AND THE RECASTING OF CIVIL RECOURSE THEORY

The impetus behind the account I shall develop is owed, in part, to the suggestion of Jason Solomon<sup>61</sup> that civil recourse theory could benefit from recent work in moral theory by Stephen Darwall.<sup>62</sup>

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60. Cf. Herschovitz, *supra* note 36 (arguing that a tort damages remedy cannot return things to the way they were).

61. See generally Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765 (2009).

62. STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006).



Darwall, in turn, drew from Kant<sup>63</sup> and Strawson<sup>64</sup> (among others). Since Strawson's understanding of reactive attitudes has long been a source of my thinking about responsibility and recourse, as well as a source of thinking of many tort theorists whom I have criticized (e.g., Perry and Honoré) Solomon's helpful critique has, in a sense, brought us full circle.

Solomon rightly picks up the claims that Goldberg and I make that tort law is a way of holding responsible those who have committed a legal wrong against oneself.<sup>65</sup> Goldberg and I have argued that the right to an avenue of civil recourse against a wrongdoer goes hand in hand with the idea that one is entitled to have a wrongdoer held responsible to oneself for having wronged one.<sup>66</sup> And we have—sometimes more informally than others—relied upon two different kinds of ideas in doing so: one lying within moral psychology and normative theory and one lying within political morality. The moral psychological idea is that the victim of a wrongdoing typically or frequently has a subjective feeling of being aggrieved and a subjective desire to respond to having been wronged by acting in some manner, self-restoratively and self-preservatively against the wrongdoer.<sup>67</sup> At least some component of such reactive attitudes is, in certain circumstances, not only natural, but legitimate, morally appropriate, and warranted. The political morality idea is that a polis that maintains a monopoly on the use of coercive force in so doing restricts in various ways the inclinations of persons—including aggrieved persons—to actualize their attitudes in response to having been wronged. In so restricting the exercise of such desires and wishes, the state incurs an obligation to do so in a manner that recognizes their legitimacy, and to do so in a manner that preserves the equality of victim and wrongdoer and preserves the equality among victims.<sup>68</sup>

Drawing upon these ideas (although not always as such), Solomon adds a deep-cutting idea from Darwall in the pure theory of morality.<sup>69</sup> According to Solomon, the pure theory of morality idea is a subset of normative reasons which have a fundamentally second-personal structure: an actor's reason to act in a particular manner essentially depends on the legitimacy of a demand of another addressed to him or her: you must do A (or you must not do A) (where A

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63. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor, ed., trans, 1998).

64. P.F. STRAWSON, *FREEDOM AND RESENTMENT AND OTHER ESSAYS* 1-25 (1974).

65. Solomon, *supra* note 61, at 1801-02. (citing John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 368 (2005)).

66. See Goldberg & Zipursky, *supra* note 65, at 368; Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 18, at 974.

67. See, e.g., Zipursky, *supra* note 13, at 83-85.

68. See, e.g., Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 18, at 974.

69. Solomon, *supra* note 61, at 1791-97.

is a way of treating or mistreating the other, demanding person).<sup>70</sup> Darwall believes that the very idea of moral obligation is second-personal in this way.<sup>71</sup>

Solomon nicely adapts Darwall's general point to the normativity of private rights of action.<sup>72</sup> He adopts the moral psychology idea, and adds a fairly strong normative statement to the effect that an individual is entitled to express the negative reactive attitude in action in some form.<sup>73</sup> He elaborates the point of political morality so that it becomes clear that the state is obligated to provide some means whereby an individual can do this.<sup>74</sup> Then he depicts a tort claim as, essentially, a second personal demand by the victim against the tortfeasor.<sup>75</sup> The provision of a right of action therefore fulfills the state duty to treat this legitimate need of victims equally: each is entitled to bring a claim against the wrongdoer.

Solomon's account solves some of the problems that beset a vengeance-based justification of civil recourse theory. There is no dependency on social contract theory in any particularly objectionable or naïve form, because he is willing to assert the justifiability of the resentment of the victim and of the victim's entitlement to express and act upon that resentment in some form. Moreover, the state's obligation to empower individuals is a combination of an individual duty, in light of the legitimacy of the victim's response and desire, and an obligation said to be inherent in treating citizens equally. Perhaps most importantly, what a tort cause of action provides is not an opportunity to hurt the wrongdoer or act against the wrongdoer as such, but rather a right to demand that the wrongdoer be held accountable. Hence, the most troubling aspect of the non-corrective-justice version of civil recourse theory is eliminated. One is not, at any level, crediting the legitimacy of acting violently against the tortfeasor. It is not as if bringing a tort claim is a civil smack at the defendant; it is a civil demand for accountability.

There are, however, at least two serious problems with Solomon's account. First, the Strawsonian point as an observation that such reactive attitudes do occur is of course not nearly enough; we need an account of why an individual is entitled to feel resentful toward the wrongdoer, an account of why an individual is in some sense entitled to act aggressively upon such resentment, and why such aggressive action is connected with the sorts of remedies supplied for private rights of action. Strawson himself was famously trying to connect re-

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70. *Id.* at 1794-97.

71. DARWALL, *supra* note 62, at 91-118.

72. Solomon, *supra* note 61, at 1794-97.

73. *Id.*

74. *Id.* at 1798-1811.

75. *Id.* at 1808.

active attitudes to the notion of responsibility, in order to finesse a set of conceptual problems in the theory of free will and responsibility; he was not trying to explain the legitimacy of the reactive attitudes themselves.<sup>76</sup>

The second point relates more to Darwall than to Solomon, but is applicable to the latter because of his dependency upon the former. One of Darwall's key claims is that standing to demand performance by the other is essential to the notion of an obligation of the other.<sup>77</sup> Moreover, for Darwall, these essentially interconnected concepts lead us to the claim that part of what it is for D to have a duty not to mistreat P is for P to be entitled to hold D accountable for having mistreated her. A principle of standing for obligees, for Darwall, is built into the notion of D's having duties to others at all.

The problem that arises, for civil recourse theory, is that a condition for the adequacy of the theory since the very beginning has been its capacity to provide a noncircular explanation of the substantive standing rule. For someone endeavoring, like Darwall, to structure an integrative theory of moral concepts, the circularity is not necessarily vicious. But given that a desideratum of the acceptability of a solution to the legal problems with which I started was the capacity to generate a nonvacuous explanation, the circularity is vicious here.

Darwall's very rich book merits greater attention as a theory of morality than I can give it here, but that is no reason to turn it aside as a resource for understanding tort law. Like Solomon—and in substantial part because of Solomon—I find Darwall's second-person demands based understanding of obligations highly suggestive for tort theory. With both the problems of Solomon's account and the fertility of Darwall's conceptual apparatus in mind, I embark on the construction of a different sort of defense for civil recourse theory.

The account that follows is indirect, traveling first through some theorizing about positive morality. The ideas elucidated in that context will permit a more focused approach to the account of rights of action and civil recourse in tort law.

## VI. ACCOUNTABILITY, RELATIONAL DUTIES, AND STANDING IN POSITIVE MORALITY

### A. *Accountability in Positive Morality*

Consider the following utterances:

1. "You were found to have plagiarized your English essay. This is not the first time. You are expelled." (teacher to student)

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76. See generally STRAWSON, *supra* note 64.

77. DARWALL, *supra* note 62, at 99.

2. "I told you to clean your room. You were not supposed to be watching TV. You are grounded." (parent to child)
3. "You actually missed the 9:00 deposition? You are fired!" (employer to employee)
4. "You cheated on your wife? You must tell her before someone else does. You must apologize. You must make amends to her. You must pray for forgiveness. You must never do it again." (clergyman to congregant)
5. "You went into Iraq and told the world there were WMD's. That was false. You must admit that it was false, explain how this happened, and try to get us out." (citizenry to political leader)
6. "That was my favorite set of DVDs. They really are gone? You just left them on the train, when I loaned them to you? I want new ones. They weren't cheap and they weren't easy to find. I will find them again, but you must buy them." (friend to friend)

All of these statements are typical of utterances said in conjunction with holding someone responsible for having done something that he or she should not have done, and, more precisely, said as part and parcel of the act of holding someone accountable for having done something wrong. In each case, there is at least an implicit reference to a norm of conduct applicable to the actor being criticized. The speaker is asserting that the actor violated an institutional norm of conduct, a norm of filial obedience, a norm of employment, a norm of fidelity, a norm of candor and truthfulness and competence, and a norm of care for others' belongings.

Additionally, in each case there is someone purporting to occupy a position in which she is entitled to issue a criticism or complaint, and to mete out some consequences or sanctions or to make a demand. In the first, it is a norm of the school and a school official is holding the wrongdoer accountable. The second is a parent occupying a position of authority over his or her child. The third is an employer, the fourth a clergyman, the fifth a citizen, and the sixth a friend.

For each of the prior examples, one could assess the accountability along various dimensions: (1) Is it a moral, legal, social, contractual, institutional, religious, political norm, or some combination of these, or a distinctive kind of norm? (2) Is the wrong that was performed a wrong to some person or class of persons? (3) What, if any, is the relation between the norm violated and the complainant? Is the complainant a victim of the wrong, an intended beneficiary, in a contractual relation, the issuer of the norm, or someone charged with the role of complainant? (4) Is the respondent acting with authority to impose some form of response, is the respondent making a demand, or is the respondent acting in some other capacity? (5) Is the response a punishment, an imposition of financial responsibility, a declaration of status, an official act, or something else?

### B. *The Distinction Between Relational and Non-Relational Duties*

As indicated in Part I,<sup>78</sup> it is possible to distinguish between two kinds of duties based on a distinction between two kinds of directives of conduct. In my prior work, I distinguished between simple directives and relational directives.<sup>79</sup> A relational directive is one that enjoins members of a certain group from acting a certain way upon members of another group. “No one is to hit anyone.” “For all X, if X has a longstanding romantic relationship with Y(X), then X shall not reveal intimate facts of Y(X)’s life to others.” A simple directive sets forth act types that the domain of persons enjoined are not to commit (or are to commit). “No one shall litter.” “No one shall stage a false emergency.”

Where there are relational directives, the directive imposes duties upon the domain of persons whom it enjoins not to mistreat the persons in the range specified by the directive. These duties, because each is a *duty not to act upon some person* in the manner specified by the directive, are aptly called “relational duties.” By the same token, duties imposed by simple directives are called simple duties. Note that relational directives also impose simple duties: the duty not to perform any killing.

Similarly, many breaches of relational directives are relational wrongs (they are wrongs to plaintiffs), and many breaches of simple directives are simple wrongs (they are not wrongs to anyone). Some simple wrongs are also breaches of relational directives.

Finally, where there are relational wrongs there are rights of potential victims not to be mistreated. That is because where there are relational wrongs, there are relational directives, and where there are relational directives there are relational duties. Relational duties are to someone; the one to whom a relational duty is breached has a right not to be mistreated in the manner enjoined by the directive. Rights against mistreatment are correlative to duties not to mistreat.

### C. *Accountability to Victims for Relational Wrongs*

Recall that example six above involved a victim of a wrong holding the wrongdoer accountable to him. There are many similar examples:

7. “You spilled my gin and tonic! At least make me a new one!” (The addressee clumsily knocked into the speaker and knocked over his gin and tonic.)
8. “You stole from me. Give it back!” (The addressee took a coveted, signed baseball from the speaker, which the speaker discovered on visiting the addressee’s apartment).

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78. See *supra* text accompanying notes 13-15.

79. Zipursky, *supra* note 13, at 59-60.

9. "You cheated on me. Move out!" (The speaker is a romantic, live-in partner of the addressee, who had an affair with another woman.)
10. "You showed my diary to your friends? Why? How could you do that to me?" [An implicit demand to explain herself, to apologize, and to make it right] (The speaker and addressee are sisters.)

In each of these cases, a relational directive was violated, a relational duty was breached, and a relational wrong was performed. In each case, the victim under the relational norm had a right not to be treated in this way, and in each case, the right was violated. The speaker in each case is demanding some responsive conduct of the addressee, in light of the addressee's having wronged her. Making the demand of responsive conduct is an act done in the process of trying to hold the wrongdoer accountable for having wronged her.

These examples are quite familiar; it does not seem a stretch to suppose that people frequently say things to one another under such circumstances. The interesting normative claim is that people *are entitled* to say such things and that people are entitled to make demands that will serve as reasons (not necessarily conclusive) for the addressee to respond accordingly. In other words, it seems plausible to suggest that the lover who was cheated is entitled to demand that her lover move out and to have him act accordingly, that the injured speaker in one is entitled to demand an apology and thereby to receive one, and so on. And it is because *one who was wronged by another is entitled to demand responsive conduct of a sort from the wrongdoer*. This point can be restated in an illuminating and provocative manner: *One who was wronged by another is entitled to have the wrongdoer perform certain responsive acts toward her if she so demands*.

I want to soften this point in a significant way and, for the moment, turn it into a sociological claim about our norms of positive morality rather than a first order normative claim: *Under widely accepted social norms governing interpersonal relationships, one who was wronged by another is entitled to demand responsive conduct of a sort from the wrongdoer and have such demands complied with*. Let us suppose, for the purposes of argument, that this sociological assertion is true, that there are, in fact, such widely acceptable social norms, and let us call such norms "demand-accountability norms of positive morality." Would such demand-accountability norms be justifiable, and if so, why?

At least five different sorts of considerations contribute to the justifiability of a set of norms of positive morality according to which there is such an entitlement, and a correlative vulnerability to demands of others. For convenience, I shall give labels to each of these five: (1) self-respect, self-protection, and respectworthiness; (2) agen-

cy recognition; (3) the duty/responsibility linkage; (4) reconciliation of wrongdoer and victim; and (5) schemes of rights and goods.

(i) *Self-Respect, Self-Protection, and Respectworthiness*

First, and most importantly, is a point made by Darwall, Strawson, and Jeffrie Murphy in *Forgiveness and Mercy*<sup>80</sup>: Those who are wronged often resent the wrongdoer, and such resentment is often entirely appropriate and justifiable.<sup>81</sup> If this is correct, then it has implications for the evaluation of those who demand responsive conduct. It is entirely implausible that resentment should simply simmer inside the person who is wronged. If feeling resentment is an aspect of normal healthy functioning, then expressing it and acting upon it in some form or other is bound to be morally appropriate, at least in the right time and place.

That is for two reasons. First, as Nietzsche and now more than a century of psychology have pointed out, unexpressed rage has a variety of negative effects on the individual and on society.<sup>82</sup> More importantly, however, the reasons behind Murphy's comments apply *a fortiori* to the appropriateness of acting in some manner towards the wrongdoer if one has been wronged. Just as one is entitled to resent the wrongdoer for having wronged oneself, so one is entitled to act self-preservatively, defensively, and self-restoratively *in response to having been mistreated*. Although this does not entail the right to act violently or inflict physical harm, it does typically entail the right to demand ameliorative responsive conduct. The idea is, in part, that one need not take the blows delivered by others lying down. Just as the proclivity to a significant degree of self-defense is healthy, normal, and perhaps even laudable (insofar as it enhances survival and self-esteem), so the proclivity to self-restorativeness, self-esteem, and control is (in suitably qualified ways) a virtue, an excellence, and a strength. Standing up for oneself is integral to maintaining one's dignity. There is a world of difference between a person who demands a duel on the occasion of a slight and the person who demands an apology for a slander. The former is a dangerous excess of operative proportions; the latter, a quotidian and normal sign of self-respect.

The moral entitlement to make a demand of one's injurer for responsive conduct is closely connected with the idea that one's forgiveness of another's wrongs to oneself may, and often should, be conditioned in various ways upon the wrongdoer's ameliorative conduct (an apology is an example of responsive conduct). Too easily for-

80. JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (2006).

81. *See id.* at 16.

82. *Id.* at 104 (citing Nietzsche's account of psychological dangers to the angry individual of unexpressed hatred); *id.* at 92 n.5 (referring to "social and personal dangers latent in [victims'] powerful feelings [of hatred]").

giving someone—too easily foreswearing resentment of one who has wronged one—is sometimes a sign of lack of self-respect.

(ii) *Agency Recognition*

Second, is a line of thought from Honoré to Perry, and Gardner. Part of recognizing the domain of what one as done as a person is recognizing the domain of actions, actions conceived in such a way as to sweep in the injuries one has done to others.<sup>83</sup> Part of owning oneself and one's achievements in the world is understanding oneself as subject to the responses of others to what one has done.<sup>84</sup> This is literally what *responsibility* and *accountability* are about. Accountability for breaches of duty and wrongs is not limited to accountability for relational wrongs. The breaking of rules and standards and the breaching of nonrelational duties will lead to consequences from authorities with standing to enforce nonrelational directives. Similarly, the breach of relational duties generates vulnerability to the demand of victims for responsive conduct. Understanding our actions as actions to others—injurings, wrongs, savings, lovings—that reach out to others goes hand-in-hand with understanding oneself as answerable to others postwronging demands, just as it involves understanding oneself as properly subject to the gratitude of others after one has benefitted them, under certain circumstances.

(iii) *The Duty/Responsibility Linkage*

Third, there is a conceptual cross-fertilization between the domain of accountability and the domain of duties. Our understanding of where our relational moral duties lie, and to whom, tends to intersect with our understanding of who will be able to hold us accountable and for which injuries. If we understand the term “obligation” to entail an obligee who will have standing to hold someone accountable for performing a duty and also for breaching it, and we in fact hold the principle that victims of relational wrongs have standing to demand responsive conduct, then it will turn out that moral relational duties are also moral relational obligations. Both the identification and the enforcement of relational directives are facilitated by a social understanding according to which wronging generates standing to hold the wrongdoer accountable. While that is in some ways a func-

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83. Honoré first put forward this idea in Tony Honoré, *Responsibility and Luck*, 104 LAW Q. REV. 530 (1988). Stephen Perry has referred to it as an “agency-oriented understanding of outcome-responsibility.” Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 491 (1992). See also John Gardner, *Obligations and Outcomes in the Law of Torts*, in RELATING TO RESPONSIBILITY: ESSAYS IN HONOUR OF TONY HONORÉ ON HIS 80TH BIRTHDAY 111 (Peter Cane & John Gardner eds., 2001) (developing and embracing Honoré’s agency-oriented understanding of responsibility in torts).

84. Gardner, *supra* note 83.



tionalist analysis, it is not a reductive or purely instrumentalist one, for the meaning and significance of obligations is not merely their connection with vulnerability to demands of obligees. The point is that it is part of what it is, for us (given how we conceive of duties), that relational duties are accompanied by obligations and standing to demand responsive conduct. It therefore appears to be part of what makes it the case that there can be a set of social mores that include relational directives, and that guide.

(iv) *Reconciliation of Wrongdoer and Victims*

Fourth, the possibility of harmonious intercourse in society depends in part on practices of reconciliation. A transaction of post-wronging demand and compliance is evidently part and parcel of a set of reconciliation practices, which no doubt have instrumental value, both in permitting interaction to go forward and in forestalling conflict. Moreover, a variety of kinds of relationships in society depend upon a background in which it is understood that this sort of accountability for wrongs exists among persons.

(v) *Schemes of Rights and Goods*

Finally, some of the relational duties of morality and the corresponding rights are connected with individual goods, and these duties and rights play a role in defining and protecting these goods. Rights in personal property and rights to bodily integrity are prime examples. The right to demand return of property that was taken or repair of property that was broken plays a substantial role in constituting what it is for there to be personal property in which an individual has a property right. More straightforwardly, the right to assistance from the wrongdoer in helping to recover from a physical injury inflicted helps to protect that interest prospectively and after the fact too; the compensation obtained through demands has at least instrumental value. Although I have here defended the moral right to demand responsive conduct on principally noninstrumental grounds, there is no reason to deny that a set of social practices that involved recognition of such rights would also enjoy a set of benefits for both constitutive and instrumental reasons.

*E. The Distinction Between the Normative Basis for Relational Duties and the Normative Basis for a Right to Demand Responsive Conduct*

Whether or not one accepts that there are such norms in our positive morality (whether there is such a thing as “our positive morality”, and whether or not such norms would actually be justifiable, all told), a conceptual point about these norms, so conceived, should now

be emerging. The set of values that would undergird a moral right to demand responsive conduct to a breach of some relational duty is not identical to the set of values that would underlie the justifiability of the relational directive giving rise to that duty. The reasons underlying a norm requiring that one keep the intimate confidences of a friend are not identical with the reasons underlying a norm according to which one would be entitled to hold a friend accountable for a hurtful disclosure of such confidences, for example. The former set of reasons pertains to both the values of trust in a friendship and the importance to individuals of delimiting others' awareness of private facts of one's life. The latter indirectly involves such values, but in the first instance pertains to allowing individuals to act self-preservatively to maintain respect and dignity for themselves, to allowing others to understand the significance of their hurtful actions to others and take ownership of them, and to fostering reconciliation.

The larger point is that even if one accepts, as I do, that a person's right to demand responsive conduct for an injuring is connected to whether that injuring was a breach of duty to him or her, one need not and should not accept that the connection is purely analytic. The notion of being accountable to another for one's breach of duty to that other is not built into the notion of a breach of duty to the other. It is a substantive, not an analytic connection. If there is a right of responsive conduct, it does not flow from the very idea of a right not to be mistreated. The relational directive itself, and the values underlying it, generate the right not to be mistreated (if there is one). The right to hold the wrongdoer to account (if there is one) is based on a set of values that justify a set of demand-making and demand-accommodating practices. To be sure, it is part of the justification of those practices that they are supportive of the entrenchment and efficacy of the directives, but that is only a part of the justification of such practices.

The point is both subtler and more striking when one steps back and takes a broader look at rights not to be mistreated and rights to demand responsive conduct from those by whom one has been treated. It is instructive to ask, with respect to each, how different attributes of a putative right holder might bear on whether the person is genuinely a right holder, and how norms of equality might affect the answer to these questions.

An example will make the point clearer. Consider the question of whether a given being—let us say a five-year old child—should be counted as among the range of persons to whom various relational duties of conduct apply: Are norms of privacy applicable to her? Is vigilance for her bodily integrity and physical health required? Part of answering that question involves looking at her needs and the conditions for her well-being. Surely, at least some norms of privacy

are applicable to her, and vigilance for her bodily integrity and physical health is required. Part of treating a child as an equal is taking seriously her needs and well-being and including her in this range of persons. Does the child have standing to demand responsive conduct, to hold others accountable for their breaches of relational duty? This is clearly not the same question. If we do regard her as having standing to hold others accountable, we are treating her as an independent locus of authority in certain ways, and in doing so, we are extending an equality norm to her. The ideals of equality and equal, mutual accountability—ideals beautifully set forth by Darwall in *The Second Person Standpoint*—are not necessarily a unified set of ideals.<sup>85</sup> It would be conceptually cogent to recognize moral directives that required she not be mistreated in various ways and yet not to treat her as having standing to hold others responsible for such mistreatments.

Two observations, now: one about substantive standing and relational duties, and one about Darwall. As to substantive standing and relational duties, it is that the enterprise in tort theory of elucidating substantive standing doctrine required developing an analytical account of relational duties according to which the potentiality for legal recovery was not built into the notion of a wrong. The very same analytical framework now permits us to give much greater depth to the notion of accountability to others for moral wrongs.

As to Darwall, the analysis suggests a challenge. At numerous points in his book, Darwall suggests that the notion of a moral wrong and the notion of accountability for wrongs are essentially linked.<sup>86</sup> A passage in the chapter on “Moral Obligation and Accountability” is representative. Referring to demands of the sort we have been discussing above as “forms of second-personal address” and the accountability of wrongdoers under such demands as “second-personal accountability,” Darwall refers to “moral obligation’s *essential* tie to second-personal-accountability” and states that “[t]he very ideas of wrong and moral obligation, therefore, are *intrinsically* related to the forms of second-personal address that . . . constitute moral accountability.”<sup>87</sup>

The analysis of relational duties and relational wrongs suggests that Darwall’s claims are, at a minimum, overstated. While the special forms of accountability to someone that exist for breaches of moral duties may indeed be tied to the structure of relational wrongs, the idea of a duty owed to another does not *entail* second personal-accountability. Such accountability may be inferred where a set of substantive norms and values about the rights to demand responsive

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85. DARWALL, *supra* note 62.

86. *See generally id.*

87. *Id.* at 99 (emphasis added).

conduct are embraced, and it may be that such norms and values are fully justified. Moreover, it may be that we will understand these relational directives and the duties they impose quite differently *if* we also embrace these norms of relational accountability. But this falls far short of an essential connection. Moreover, the assertion that there is an essential connection risks obscuring the distinctive substantive values underlying both the relational duties and the norms of accountability.

*F. The Distinction Between a Demand-Dependent Responsive Duty and a Demand-Independent Responsive Duty*

The right to demand responsive conduct of the wrongdoer is, in the respects laid out above, victim-centered; it is rooted in the legitimacy and value of certain self-defensive and self-preservative attributes, reactions, and attitudes to having been wronged. This aspect of the right to demand responsive conduct is nicely illustrated by example nine, above: “You cheated on me. Move out!” spoken by someone to her lover and apartment-mate. For the sake of simplicity, let us suppose that the statement is uttered by a woman who learned that her lover/boyfriend had a weekend romance with another woman, that the woman speaking and her boyfriend had rented an apartment together, and that the material hardship of his moving out is not extraordinary or irreparable (because of nearby friends or family).

Let us suppose that it is justifiable for her to make this demand in response to his having cheated on her and that he ought to move out if she so demands under these circumstances. It would hardly follow from these statements that the boyfriend would have a duty to move out even if she did not so demand. Nor would it follow that he has a duty to offer to move out, if she does not so demand. Her right to have him perform certain acts because of what he did to her is in part her right to initiate a demand that he perform these acts. She involuntarily stood as a victim of his wrong—the betrayal of trust. Having endured this wronging, and the injury (fractured trust and wounded feelings), she is now in a position to complain of having been so wronged and to demand ameliorative conduct of him. Likewise, having so wronged her, he is vulnerable to her demands for responsive conduct. Her right to have him perform certain acts because of what he did to her is in part her right to initiate a demand that he perform these acts.

The more general point is that the fact of having been wronged by another generates not only a basis for complaining of having been wronged by the other, but also a basis for a demand for ameliorative conduct by the wrongdoer. This might be called a patient-relative

right. There is a history of a wrong and the history of the wrong gives rise to a prerogative in the victim.

As I have suggested in prior work, the prerogative to demand responsive conduct is the mirror image of self-defense, conceptually.<sup>88</sup> It is the reasonably anticipated future of conduct from the wrongdoer to the victim that generates a right in the victim to act against the wrongdoer, in self-defense. Conversely, it is the history of conduct by the wrongdoer against the victim that generates a right to demand responsive and ameliorative conduct. In self-defense, it is because the future action is deemed unavoidable without the victim forcing herself upon the expected wrongdoer that victim is allowed to force herself onto the expected wrongdoer. The expected wrongdoer is required, morally, to be the object of the victim's preemptive act. In response to a wrongdoing that was done, the actual wrongdoer is required to be subject to the victim's control, to her demand for ameliorative conduct. In both cases, our moral understanding of individuals is that they are entitled to be self-protective, and being self-protective often means responding to wrongs upon oneself by asserting control over the wrongdoer. In both cases, an individual's right to be treated as autonomous and to be protected from the intrusions and demands of others is qualified by the privilege of others to be self-protective both before and after having been wronged.

It is easy to misconstrue the right to demand responsive conduct for at least three reasons. The first is that—to put the point ironically—there are morally commendable and morally criticizable ways for a wrongdoer to follow-up his wrongdoing, and it is often commendable (and sometimes obligatory) to offer one's responsive conduct or perform such conduct prior to (and without) being asked to do so or having such conduct demanded. If I spill my friend's gin and tonic or stain his rug with marinara sauce, I should probably get him a new drink or pay to have his rug cleaned, or at least offer to do so. I should not wait until asked or demanded. In a casual case like a spilled drink, one might not actually describe the spiller as having a duty to get a new drink, but that is perhaps because the language of "duty" is typically a cue that more serious interests are at stake. In any event, it is at least commendable and a sign of good character to do so, and it may well be that there is a duty to do so.

Such examples sometimes even tend to prove the opposite of what might seem to be shown. A large part of why one might regard it as commendable, in this example, to pay for carpet cleaning without asking or to go and get another drink and clean up the mess, is that it would be better if one's friend (or host) did not have to make such a demand. One recognizes that such a demand would be legitimate,

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88. Zipursky, *supra* note 27, at 736.

and spares the injured person the insecurity and discomfort of making it, in some of these cases. The right to make the demand does not derive from the duty to perform the act. Rather, the duty to perform the act—if there is one—comes from the legitimacy of the demand and the virtue of performing the ameliorative conduct without requiring a demand.

A second reason for misconceiving the nature of the right to demand responsive conduct relates to a broad domain of wrongs—property wrongs. Imagine that Jane picks up a laptop from the large table in the college library where she is sitting, places it in her knapsack, and then reopens it at Starbucks a couple of hours later, where she realizes that it is not her laptop, but another sophomore's (say, Wayne's). Wayne happens to be sitting at the same Starbucks, having been upset for the past couple of hours that his laptop was (he thought) stolen. If Wayne demands that Jane return his laptop, she will have at least a *prima facie* duty to do so. But Jane has a duty to do so even prior to Wayne's demand; more importantly, Wayne's demand does not trigger Jane's duty. Her duty comes from the fact that Wayne owns the laptop that she took. One of the many valuable facets of the institutions of property law is that the rights laid down as a bundle are structured such that we understood property rights to entail a variety of duties in others, both negative duties and, under certain circumstances, affirmative duties. One way of understanding the difference between Ripstein's views and mine is that Ripstein believes the conceptual structure of the Kantian account of private rights is broad enough and flexible enough to cover all of tort law<sup>89</sup> (as well as other areas of private law), whereas I see it as an untenable stretch beyond the law of property (and, perhaps, property torts). A third reason is that many wrongs are ongoing or continuous, and the demand that a victim would make is a demand to discontinue the wrongful conduct against him. In this case, there is a duty to comply with the demand that preexists the demand itself, because the duty is just the primary duty of conduct. Interestingly, a central example of Darwall's is of this form; the injurer is stepping on the victim's foot and the victim demands that the injurer remove his foot.<sup>90</sup> This is an ongoing battery and the demand for responsive conduct is really a demand to discontinue the battery.

It might seem that, in the past few paragraphs I "hath protest[ed] too much," that the power of the duty-of-repair intuition is evidently great and displays the superior normative strength of corrective justice theory, and that these prior three explanations are examples of efforts to explain away the duty of repair rather than to explain the

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89. Ripstein, *supra* note 38.

90. DARWALL, *supra* note 62, at 5.

moral ideas underlying tort law (an argument I have made, following Weinrib and Coleman, against economic accounts of tort law). It is important to see why such an *ad hominem* objection would not be well taken.

Our ultimate problem is to explain the structure of the law of torts, and I have since the beginning of my work on civil recourse theory offered sustained arguments that civil recourse theory better captures the actual structure of tort law than corrective justice theory. Whether sound or unsound, those arguments are *not* what is at issue here. What is at issue is a question that is deeper, narrower, and distinct: the question is whether the assertion that a person has a right to demand ameliorative conduct of someone by whom he is wronged can stand on its own, independent of the claim that the wrongdoer has a prior duty to supply such ameliorative conduct. I have argued—even prior to the subsequent explanations—that such an assertion is cogent and plausible.<sup>91</sup> I have not denied that there often are moral duties of repair because of which there is a right to demand ameliorative conduct, both in the proprietary and the nonproprietary context. The point is that the easy assumption that, in morality, the right to demand ameliorative conduct from a wrongdoer flows from a preexisting duty of repair need not be true in order for there to be a right to demand repair. Relatedly, the existence of a right to demand ameliorative conduct does not entail the existence of a duty to supply ameliorative conduct absent such a demand.

Once one sees the possibility of a right to demand ameliorative conduct, it is easily observed in a wide range of domains in ordinary life. A person who inadvertently makes a nasty comment or insinuation about her friend or family member will sometimes be confronted with a demand that she explain herself. “What did you mean by *that*?” If not so confronted, the nasty friend may (and probably should!) diverge from her path of nasty commentary to safer commentary . . . and change the subject. It may well be, however, that the demand is something she ought to comply with, once issued.

On a completely different front, imagine an impoverished African country that receives substantial monetary assistance from the United States on a regular basis. Add to this that members of the military forces of this nation, on an escapade that goes beyond what they are directed or permitted by their superiors to do, torture three American soldiers. In response the United States demands that the country return the very recent \$10 million installment of a loan program. Whether the U.S. would be morally entitled to demand the return of the money is not the same as the question of whether this country should return the money absent such a demand.

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91. Zipursky, *supra* note 13, at 55-70.

## VII. RETURNING TO LAW: CIVIL RECOURSE AND THE RIGHT TO DEMAND RESPONSIVE CONDUCT

Let us now return to tort law and tort theory. A person who has been wronged is morally entitled to demand responsive conduct of her wrongdoer. She is morally entitled not only to articulate particularized injunctions for responsive conduct, but to articulate them in a way which is such that her doing so—in conjunction with the fact that the wrongdoer did wrong her, in the way that he did—counts as a reason for the wrongdoer to supply the beneficent conduct. The entitlement to utter the demand, which entitlement is engendered by the commission of the relational wrong to her, is of course not simply an entitlement to speak certain words, but an entitlement to have another person act in accordance with one's having spoken those words, or at least to act in a manner that reflects the demand's being a ground for regarding such a responsive performance as mandatory. That is because having been wronged generates both a grievance (in the victim) and a normative vulnerability in the wrongdoer; the wrongdoer is vulnerable to the legitimate demand for responsive conduct by the aggrieved victim. As to the responsive conduct, there is a moral liability or vulnerability to perform it or some facsimile thereof, if demanded, but the conduct demanded is not necessarily conduct that, absent such a demand there would be a duty to perform. In all of these respects, there is a right in the victim to demand responsive conduct of the wrongdoer. To be more precise, there is a *prima facie* moral right in the victim of the relational wrong to demand responsive conduct.

We are now in a better position to offer a normative account for the Right of Action Principle in tort law. A victim of a relational legal wrong is entitled to demand that the wrongdoer engage in certain responsive conduct toward her, just as a victim of a relational moral wrong is entitled to demand responsive conduct. The presence of courts and law permits plaintiffs to make enforceable legal demands for such responsive conduct. The demand is in one respect addressed to the tortfeasor, but in another respect, the state is also an addressee, for it is because of the state's role that the plaintiff's asserting this claim (and backing it up) is able to count as a legal reason for the defendant to provide such responsive conduct. The plaintiff has a legal right to the state's assistance in authenticating the validity and enforceability of plaintiff's demand, and in civil tort litigation, the plaintiff comes to court exercising that right through the filing of a complaint and the expression of a prayer for such an authentication—a judgment.

The right to make such a demand is rooted in the right to self-preservative, defensive, and self-restorative conduct. Similarly, a de-



fendant's legal vulnerability—liability—is rooted in the defendant's moral accountability and moral responsibility for the wronging, the injuring of the plaintiff. For relational legal wrongs, the moral accountability is accountability *to the plaintiff*. And the response typically demanded is compensating the plaintiff monetarily. The moral demand becomes a legal demand, which the victim has the legal power to make. Providing an individual who has been wronged with a right of action is recognizing in the individual a right to make an effective demand that the wrongdoer account to her for having wronged her.

The accountability of an injurer through tort law is an earmark of relational duties and relational wrongs that tort law recognizes as legal duties and legal wrongs. Indeed, legal actors utilize their knowledge of the boundaries of accountability to ascertain where and when there are legal duties, just as judges and lawyers do. All of these actors also do the opposite, however; they frequently make judgments about when there will be accountability, and when there will be a right to demand compensation, by reference to their knowledge of what the primary legal duties and legal rights of the law are. In law and in morals, our understanding and awareness of the primary duties and rights is intertwined with our understanding and awareness of rights of action and liability. It is, in some ways, *substantially less than material equivalence*, for there are affirmative defenses and jurisdictional limitations because of which there may be a legal wrong to the victim but no legal accountability; it is also, in some ways, *an understatement to say there is simply rough congruence between when there is a legal wrong and when there is legal accountability*, because the connections in the law itself are very close. However, it is an error to say that there is an analytical equivalence.

Courts provide persons who were wronged by others with an avenue of recourse against the wrongdoer. In prior work (both on my own and with John Goldberg), I have sometimes elaborated on the idea of civil recourse in a manner that emphasized that filing a law suit was *acting aggressively against the defendant in a manner that fell short of violent aggression*.<sup>92</sup> It now strikes me that this was misleading and inappropriately inflammatory (even if it might, in some respects, be true). The better way to understand civil recourse through the courts is not *as contrasted with violent action or no action at all*. Perhaps the better way to understand it is *as being empowered to make an enforceable demand for responsive conduct rather than having no way to respond at all to having been wronged*.

As many of my examples above have suggested, those who are wronged in ordinary life sometimes demand responsive conduct of wrongdoers. Many of the cases above involve scenarios in which it is

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92. See, e.g., Zipursky, *supra* note 27, at 737.

not necessarily unrealistic to suppose that such demands might be complied with. Moreover, as a matter of suggestion and speculation, I indicated that there are social practices and positive norms of morality in which we individuals understand one another to be entitled to make utterances that are treated as demands, that serve as reasons to perform certain responsive conduct.

What the discussion above did not acknowledge is that—even if there are norms of positive morality under which such demands will be complied with—such norms are structured in ways that call upon personal relationships, power settings in the workplace (or international relations), or background understandings of legal accountability. The reality is that, assuming positive moral norms of this type exist at all, they are far from adequate to deal with many of the serious wrongings individuals endure at the hands of others—strangers, drivers, professionals, companies, landowners, government actors, and so on. A raw liberty to utter words expressing a demand for responsive conduct (typically compensation) is nearly worthless.

By making available private rights of action in tort to those who have been wronged, tort law meets this need. There is a way to respond to having been wronged that has power. And conversely, the accountability or answerability for having wronged others that exists under positive morality and nonlegal institutions is something, but it does not consistently extend far and wide. The fact that victims have private rights of action against wrongdoers makes the wrongdoers accountable in a real and practical manner.

The Principle of Civil Recourse is best understood as saying that one who is wronged is entitled to have some way of responding to the fact of having been wronged. The grounds of the entitlement are having been wronged, but the question we have been examining is why having been wronged provides a ground of entitlement to respond. What I have done to answer this question is to flesh out the notion of what the legal power to respond (through a right of action) is. It is a power to make an enforceable demand for ameliorative conduct from the wrongdoer. A demand for ameliorative or responsive conduct from a wrongdoer can be understood as self-restorative, self-preservative, and self-defensive. Recall Murphy's statement that resentment "functions primarily in defense, not of *all* moral values and norms, but rather of certain *values of the self*."<sup>93</sup> Whether or not it arises from a feeling of resentment, a demand by a victim for ameliorative conduct from a wrongdoer is an act one is entitled to perform for reasons that relate to values of the self. In this respect, the Principle of Civil Recourse derives from the same set of values as the principle that one is entitled to defend oneself against aggressors.

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93. MURPHY & HAMPTON, *supra* note 80, at 16.

It should be clear by now that if the Principle of Civil Recourse essentially articulates a right to demand ameliorative conduct of the defendant, it does not itself depend upon a notion of corrective justice. The defendant has a vulnerability to this demand, which means that if the demand is made and adequately supported, the plaintiff's having made it creates a legal duty in the defendant to the plaintiff—usually a duty to compensate the plaintiff. It is not necessarily (or even usually) the case that the right to demand ameliorative conduct in fact derives from a prior duty to compensate. The right to demand ameliorative conduct derives from having been wronged, in light of what Murphy calls values of the self.<sup>94</sup>

Conversely, civil recourse theory does not derive from a notion of retributive justice, either. The plaintiff's right is not essentially a right to inflict financial hardship on the defendant, in light of the injury the defendant inflicted upon her. The plaintiff's right is a right to demand that the defendant respond to defendant's having wronged plaintiff, and to demand that the defendant ameliorate the wrongful injury inflicted. It is about claiming against the defendant under a conception of self-restoration, not a conception of anger or destructiveness or injuriousness toward others.

The presence of a principled understanding of the institution of private rights of action, along these lines, does not preclude a broader variety of reasons for thinking it is valuable to have this law, nor does it preclude recognition of shortcomings of the law. Surely, we see even more clearly now what a significant role the rights of action have in helping to articulate where the legal wrongs are and where accountability lies, and how tort law gives teeth to the notions of right and duty in the law and in ordinary social mores. These notions have a substantial guidance role for lawyers and nonlawyers alike. This is an example of the constructive justification for tort law; it is not the only one, but it is an important one that is easily overlooked.

It is possible, too, that the notion of corrective justice itself in private law is one that is constructed through the working of tort law as I have just analyzed it. For if the plaintiff was wronged and makes a demand that the defendant compensate her, and the court adjudicates the demand to be warranted and enters judgment, and the defendant complies with the judgment against it, the plaintiff is indeed compensated. She has, in a sense that is far too metaphorical to sustain the weight corrective justice theorists give it, restored herself through the legal system, by forcing the defendant to compensate her. That we see this occur in the tort system is one of the reasons we are inclined to describe it as a system that corrects injustices, or that does corrective justice. The capacity of a system of private

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94. *Id.*

rights of action for wrongs to allow us to see our system as doing justice is arguably another worthwhile attribute of the system, and one that would fall into the constructive side of the ledger. Doing corrective justice is one of many things that tort law sometimes accomplishes, but its capacity to do so is not basic to the account of private rights of action.

### VIII. CONCLUSION

The key idea in what I have called “substantive standing” cases in torts is that the wrong of which a plaintiff is complaining was a wrong to someone else, but not to him or her. Indeed, “substantive standing” was selected principally in order to signify a distinction from the technical legal meaning of “standing” as ordinarily used by lawyers, which is to a significant extent a procedural question going far beyond tort or any particular private law subject. When I see that what lies at the core of the Principle of Civil Recourse is the idea of a right to demand responsive conduct, I am even less surprised that standing is the phenomenon that drew me toward the Principle of Civil Recourse. For the right to demand responsive conduct that lies at the normative core of a right of action is fundamentally something the state supplies to a person who has been wronged. Empowering him or her—the person who was wronged—is a way of recognizing that he or she occupies a special place. It is a way of recognizing that she *does have standing to complain about what the defendant did, for it is she who was wronged by the defendant*. A legal complaint is not, of course, just a whine; with it comes a demand for conduct responsive to the wrong that was done.

Although there are no doubt many different kinds of theorist’s illusions in this account, there is at least one kind of illusion I hope to have deflated in tort theory. That is the illusion that the payment of compensation in tort is a way of complying with the primary duties of tort law. The cold hard truth about tort law is that there are many—perhaps most—mistreatments of one person by another that cannot be addressed in a way that leaves plaintiffs intact. The duties not to mistreat by battering, negligently laming, libeling, defrauding, and so on, are duties whose breach very often cannot be undone. The law of torts does not nullify, reverse, or neutralize the mistreatment or the wrong. It recognizes a victim’s standing to complain about the wrong and to demand ameliorative conduct from the wrongdoer.